Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

STAMP & RETURN

Mediacom Communications Corp.,	)	
	)	
Complainant,	)	CSR No. 8233-C
	)	
v.	)	CSR No. 8234-M
	)	
Sinclair Broadcast Group, Inc.	)	
	)	
Defendant.	)	

EX PARTE COMMENTS OF SUDDENLINK COMMUNICATIONS IN SUPPORT OF MEDIACOM COMMUNICATIONS CORPORATION'S RETRANSMISSION CONSENT COMPLAINT

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Cequel Communications, LLC d/b/a Suddenlink Communications ("Suddenlink") hereby submits these *ex parte* comments in the above-captioned proceeding. Suddenlink supports Mediacom's Complaint and urges the Commission to take the steps necessary to ensure that retransmission consent is applied in a manner consistent with the public interest.

I. INTRODUCTION AND SUMMARY

While Suddenlink appreciates the Commission's historic approach to retransmission consent negotiations, the retransmission consent marketplace has changed dramatically in recent years and warrants that the Commission reconsider its regulation of retransmission consent disputes. Market changes of the type and magnitude at issue in this proceeding call out for increased scrutiny, because they will materially impact the delivery of broadcast signals and the rates paid by MVPD customers. The potential impact is particularly grave in cases involving broadcast "duopolies."

When Congress first provided broadcasters with retransmission consent authority in 1992, it affirmatively assigned the Commission responsibility for ensuring that this statutory creation operates in a manner consistent with the public interest. In particular, it instructed the Commission to regulate retransmission consent as necessary "to ensure that the rates for the basic service tier are reasonable."[1] A few years later, Congress imposed a special "duty to negotiate in good faith" on retransmission consent parties and assigned the Commission enforcement responsibility.[2] Despite Sinclair's assertions, Congress never intended retransmission consent negotiations to operate entirely outside the Commission's regulatory oversight.

The evidence presented by Mediacom in this proceeding compels Commission intervention. Sinclair's filings with the Commission reveal a disregard for the Commission's regulatory responsibility. Sinclair effectively contends that, as long as a broadcaster shows up at the negotiation table, it is free to demand whatever it wants in retransmission consent fees while the Commission is powerless to intervene. When all is said and done, Sinclair insists that the Commission has no meaningful role in resolving retransmission consent disputes.

Mediacom is not asking the Commission to specify a particular retransmission consent rate. To the contrary, Mediacom evidently would be content if Sinclair were subjected to some form of alternative dispute resolution ("ADR") and interim carriage. This modest relief, if granted, would not entangle the Commission in the details of this particular retransmission consent negotiation, nor would it automatically reduce the resulting retransmission consent fee. It would simply provide a reasonable mechanism to move forward. Most importantly, by

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[1] 47 U.S.C. Section 325(b)(3)(A)

[2] 47 U.S.C. Section 325(b)(3)(C).

providing interim carriage, the Commission would promote the public interest by ensuring continued viewability of Sinclair's programming.

Suddenlink respectfully submits that the Commission has the authority to provide Mediacom's requested relief, including interim retransmission consent authority. Indeed, confronted with the allegations in this case, the Commission has a responsibility to reassert public interest considerations.

II. THE COMMISSION SHOULD CONSIDER THE SERIOUS BROADCAST CONTROL ISSUES AT ISSUE IN THIS PROCEEDING.

Mediacom's Complaint raises serious concerns regarding Sinclair's ownership and operational practices, particularly regarding its control over retransmission consent for multiple "Big 4" affiliates in the same market.

Suddenlink submits that when a single entity controls retransmission consent negotiations for more than one broadcast station in a single market – *either* through direct ownership *or* a contractual (LMA) relationship -- it is able to command fees well above the level that would be achieved if the two stations negotiated individually. This problem is compounded when the broadcaster – based on its size – already has significant market power. Often times, the broadcast entity's ability to command above-market rates (based on its "duopoly" presence in one market) extends to additional markets in which it controls only a single broadcast station, because broadcast entities (like Sinclair) negotiate rates for all their stations on a group basis as opposed to a market by market approach. Therefore, when a relatively large broadcaster, like Sinclair, combines several duopolies across multiple markets served by an MVPD, there is a strong potential for abuse of market power.

Suddenlink has examined its own retransmission consent agreements and has concluded that, where a single entity controls retransmission consent negotiations for more than one "Big

4" station in a single market, the average retransmission consent fees Suddenlink pays for such entity's "Big 4" stations (in all Suddenlink markets where the entity represents one or more stations) is 21.6% higher than the average retransmission consent fees Suddenlink pays for other "Big 4" stations in those same markets. This is compelling evidence that an entity combining the retransmission consent efforts of two "Big 4" stations in the same market is able to secure a substantial premium by leveraging its ability to withhold programming from multiple stations.

Suddenlink also attempted to isolate situations involving broadcasters that create a "duopoly" presence in a market through a contractual (LMA) relationship, rather than through licensed ownership. In systems where Suddenlink carries a broadcast station that is represented by entities that have a known LMA-based "duopoly" in at least one Suddenlink market, the aggregate retransmission consent fees paid by Suddenlink on a per customer basis are 38.9% higher than in systems that do not include such entities. This clearly shows that LMA-created "duopolies" have an especially strong impact on driving up retransmission consent fees paid by MVPDs and ultimately by their customers.

Based on its own experience, Suddenlink believes that broadcast entities, which aggregate retransmission consent authority, both within a single television market and between multiple television markets, are able to extract excessive profits that would not otherwise exist in a truly open and competitive market. The impact is greatly magnified when a large broadcaster maintains several "duopolies" across in the markets served by an MVPD. Suddenlink believes, therefore, that retransmission consent negotiations based on such aggregated retransmission consent authority are contrary to the public interest because they threaten to unreasonably inflate basic service rates.

Importantly, Suddenlink itself has encountered significant issues while negotiating for Sinclair's retransmission consent. For example, in 2006, Sinclair sought an upfront retransmission consent payment for several of its stations, including its two Charleston, West Virginia stations (WCHS-ABC and LMA-operated WVAH-FOX) of $200 per customer or roughly $40 million. Sinclair wanted that extraordinary upfront payment supplemented with recurring monthly fees of at least $1 per customer. These facts, among others, compelled Suddenlink to file a Complaint with the Commission in July 2006. Faced with Sinclair's threat to force Suddenlink to pull these stations from Suddenlink's customers, Suddenlink ultimately signed a new retransmission consent arrangement with Sinclair and subsequently withdrew its Complaint. This experience made it painfully clear to Suddenlink that Sinclair was willing to deny Suddenlink customers access to its broadcast stations, if only to advance Sinclair's own interests.

The ability of broadcasters like Sinclair to command higher retransmission consent fees by aggregating retransmission consent authority for multiple stations in the same market further threatens the reasonableness of basic service rates. This "duopoly premium" requires careful Commission consideration.

Not surprisingly, Sinclair argues, "A single retransmission consent dispute between Mediacom and Sinclair is obviously not the proper forum for considering the propriety of Sinclair's LMAs or JSAs. Neither are allegations or past actions in any way relevant to the current dispute between Sinclair and Mediacom."[3] Sinclair understandably would prefer to avoid or delay Commission review of the propriety of its ownership practices as they relate to

[3] Answer at 23.

retransmission consent, but a meaningful evaluation of the "totality of the circumstances" in this proceeding requires careful consideration of Mediacom's allegations.

Sinclair's existing retransmission consent arrangements, as described by Mediacom, raise the troubling possibility that Sinclair and other broadcast licensees have impermissibly transferred critical station responsibilities. Sinclair effectively controls retransmission consent authority for stations it does not own, which necessarily effects how those stations reach the communities they are licensed to serve. As Comcast notes in its Comments, "[N]either Congress nor the Commission has embraced the view that LMAs or similar arrangements may be used to transfer from one broadcast licensee to another the right to negotiate retransmission consent agreements."[4] In fact, Section 325(a) of the Communications Act requires that retransmission consent be provided by the "originating station."[5] The Commission long ago eliminated a regulatory provision stating that "Broadcasters may assign their retransmission consent rights to another party...."[6]

Sinclair's retransmission consent arrangements, as described by Mediacom, are also seemingly at odds with Section 76.65(b)(1) of the Commission's Rules. Section 76.65(b)(1)(ii) identifies as a *per se* "good faith" violation, "Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent."[7] If either a Sinclair station or a station managed by Sinclair through an LMA lacks the contractual ability to independently convey retransmission consent to Mediacom, its negotiations with

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[4] *Ex Parte Comments of Comcast Corporation*, CSR 8233-C, 8234-M, at 3, submitted Nov. 25, 2009.

[5] 47 U.S.C. Section 325(a).

[6] 47 C.F.R. Section 76.64(k) (1993).

[7] 47 C.F.R. Section 76.65(b)(1)(ii).

Mediacom necessarily violate this regulatory provision. Although Mediacom did not focus on this *per se* violation in its Complaint, it clearly warrants Commission consideration.

III. THE COMMISSION SHOULD CONSIDER THE IMPACT OF SINCLAIR'S RETRANSMISSION CONSENT DEMANDS ON BASIC SERVICE RATES.

When Congress adopted retransmission consent in 1992, it expressed concern with the rate implications of its action. Indeed, Congress specifically instructed the Commission to adopt regulations ensuring that Retransmission Consent would not have an adverse impact on basic cable rates. Section 325(b)(3)(A) provides:

> The Commission shall...establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent . . . . [and] shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligations...to ensure that the rates for the basic service tier are reasonable.[8]

The Commission originally concluded that no special restraint on broadcasters' exercise of retransmission consent was necessary to satisfy Congress' concern.[9] Significantly, the Commission's 1993 decision was expressly premised on the factual record in existence *at that time*. The decision explains, "[W]hile retransmission consent may have an effect on basic service tier rates, the record here provides no evidence that the effect may be significant...."[10] The decision, therefore, logically concludes, "[B]ased on the record in this proceeding, we decline to adopt regulations specifically limiting retransmission consent rates here."[11] That

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[8] 47 U.S.C. Section 325(b)(3)(A).

[9] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, Report and Order ("Report and Order"),* 8 FCC Rcd. 2965 at ¶ 178 (1993).

[10] *Id.*

[11] *Id.*

conclusion might have been appropriate in 1993, but that does not mean it is still appropriate in 2009.

Cash payments for retransmission consent, which were negligible in 1993, are now commonplace and escalating rapidly. The public record is replete with broadcasters espousing their ability to extract large retransmission consent payments from MVPDs. In fact, Sinclair's Answer acknowledges that the broadcast industry's retransmission consent revenue is increasing at a remarkable rate. The Answer references Sinclair's own 80% increase in "retrans revenue" over a three year period and then highlights examples of even more alarming increases.[12] In particular, the Answer notes, "CBS recently announced that it expects to receive retrans revenue in 2012 of $250 million, an 861% increase from the retrans revenue it realized in 2008.[13]

By Sinclair's own admission, retransmission consent fees are increasing far faster than basic cable rates and at large multiples of the overall rate of inflation. Retransmission consent fees now constitute a substantial part of the programming costs associated with basic service tiers. It is undisputed in this proceeding that retransmission consent costs today are dramatically higher than they were in 1993.

Sinclair's Answer suggests that the recent escalation in retransmission consent fees is attributable to a fundamental shift in the marketplace – *i.e.*, the increased competition among multichannel video programming distributors ("MVPDs"). The Answer explains that increased competition among MVPDS has provided broadcasters with negotiating leverage they simply did not possess in 1993:

> Sinclair would actually argue that the process has not worked particularly well from a broadcaster's standpoint in that it took more than 10 years after Congress acted ... for broadcasters to begin receiving compensation from cable

[12] Answer at 18 – 19.

[13] Answer at 18, n. 29 (citation omitted).

> companies.... In fact, it was only after satellite providers began having the right and ability to provide local-into-local signals, and the elimination of the monopoly power by cable providers, that broadcasters began being paid at all.[14]

MVPD competition has been actively encouraged by the Commission for many years, with the underlying premise that competition would benefit the public by restraining consumer prices. Unfortunately, that premise now appears faulty – at least with regard to programming costs. Broadcasters, like Sinclair, are now exploiting intensified MVPD competition to dramatically increase their retransmission consent demands. In fact, on more than one occasion, a broadcaster with which Suddenlink was having a retransmission consent dispute has threatened to offer a cash incentive (a "bounty") to competing MVPDs for customers the competing MVPD was successful in gaining from Suddenlink as a result of that dispute. The overall escalation in retransmission and programming costs is a matter of serious concern and not in the public interest.

The Commission has a special responsibility with regard to retransmission costs. As noted above, Section 325 of the Communications Act specifically requires that the Commission administer retransmission consistent with "the Commission's obligations....to ensure that the rates for the basic service tier are reasonable."[15] Senator Inouye, who authored the retransmission consent provision, emphasized that "the FCC has a clear mandate to ensure that retransmission consent will not result in harmful rate increases."[16] Retransmission consent fees cannot continue to increase at the level described by Sinclair without dire rate consequences.

Suddenlink appreciates that comprehensive changes to retransmission consent regulation might best be achieved through a formal rulemaking. In the meantime, however, the

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[14] Answer at 8, n. 8.

[15] 47 U.S.C. Section 325(b)(3)(C).

[16] 138 Cong. Rec. S563 (Jan. 29, 1992).

Commission should consider Mediacom's Complaint in the context of clear Congressional concern regarding the potential rate implications of retransmission consent.

IV. THE COMMISSION SHOULD EVALUATE THE DUTY TO NEGOTIATE IN GOOD FAITH CONSISTENT WITH THE PUBLIC INTEREST.

Sinclair clearly assumes that it can safely demand *any* level of retransmission consent compensation, as long as it does not commit one of the seven *per se* negotiation violations. Its Answer extols the benefits of private negotiations and denigrates the need for any Commission oversight. Sinclair's approach ignores its own "public interest" obligations as a broadcaster and effectively renders the Commission's "totality of circumstances" test meaningless. Indeed, Sinclair reports, "In the decade since the good faith negotiating requirement was imposed the Commission has, without exception, declined to involve itself in the details of retransmission consent negotiations."[17]

As noted above, a changed marketplace now requires the Commission to reconsider the "totality of circumstances" prong of its "negotiate in good faith" test. Confronted with industry-wide escalating retransmission consent demands and Sinclair's declaration of its "willingness not to be carried if it cannot obtain a price acceptable to Sinclair,"[18] a failure by the Commission to act here risks further emboldening cash-hungry broadcasters to increase their retransmission consent demands.

In implementing Section 325(b)(3)(C) in 2000, the Commission properly recognized that "Congress has signaled its intention to impose some heightened duty of negotiation on broadcasters in the retransmission consent process. In other words, Congress intended that the parties to retransmission consent have negotiation obligations greater than those under common

[17] Answer at 31.

[18] Answer at 5.

law."[19] As Mediacom explains, "[R]etransmission consent is a unique, statutorily-created property right in a broadcast signal that is transmitted using a public resource – the airwaves—pursuant to a license granted to the broadcaster on condition that such use conform to and serve the public interest."[20] Congress imposed on broadcasters a special duty to negotiate in good faith that it did not impose on other cable programmers. A broadcaster's duty to negotiate in good faith must consider its special obligation to serve the public interest and must require the broadcaster to do more than simply show up for the negotiation.

Retransmission consent disputes today should be evaluated in the context of the broadcast industry's increasing reliance on MVPDs to deliver broadcast programming to local consumers, particularly in light of the recent digital transition. As the Commission is well aware, the cable industry was called upon to play a critical role in facilitating that transition by ensuring the public that broadcast programming would continue to be available after analog broadcasting was terminated. Suddenlink, like many operators, introduced low-cost basic service options so as to preserve access to local broadcast signals by consumers who previously relied exclusively on over-the-air analog broadcasting. Additionally, cable operators expended substantial time and money to ensure a smooth digital transition, including the funding of a national call center - Suddenlink alone spent over $5,000,000. Rather than being rewarded for these pro-consumer efforts, the cable industry is now being penalized by broadcast entities insisting on dramatic increases in the retransmission consent fees associated with providing to the public the very retransmission service that the Commission and the broadcast industry previously encouraged. It is ironic that, having taken steps to preserve access to local broadcast signals, the cable industry

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[19] *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order*, 15 FCC Rcd. 5445 at para. 24 (2000).

[20] Reply at 5.

is now confronting broadcasters (like Sinclair) who have no compunction about denying that access.

Suddenlink believes that the modest intrusion on Sinclair's negotiation discretion sought by Mediacom is necessary and appropriate. Mediacom, after all, is not asking the Commission to dictate a particular rate result. It is simply asking that Sinclair submit to an ADR process *before* forcing Mediacom to either meet the Sinclair's retransmission consent demand or terminate carriage.

V. THE COMMISSION HAS AUTHORITY TO GRANT INTERIM CARRIAGE RELIEF.

Providing relief in a timely fashion in retransmission consent disputes is imperative if the Commission has any concern regarding the rapid escalation in retransmission consent fees. Once an MVPD is forced to suspend carriage of a popular broadcast station, the damage to the MVPD and its customers is irreparable. Customers, after all, suffer as soon as they lose access to the deleted programming. Heightened video competition has only emboldened broadcasters to terminate retransmission consent rights and wait out an MVPD as a negotiating strategy.

The Commission should be skeptical of broadcasters who are unwilling to voluntarily extend retransmission consent authority while the parties continue to negotiate or oppose interim carriage relief while the Commission considers the underlying complaint. Those broadcasters are doubtlessly seeking to maximize their leverage at the expense of the viewing public. Just as the Commission was committed to ensuring that the digital transition would not lead to the public losing access to broadcast signals, it should grant temporary relief in cases like this one, where the public otherwise may lose access to popular broadcast programming.

Confirming its indifference to Mediacom's customers, Sinclair opposes the Commission providing any sort of interim relief while it considers Mediacom's underlying allegations.

Sinclair's opposition, however, is based on two faulty premises. First, Sinclair wrongly assumes that the "totality of the circumstances" could *never* justify Commission intervention in private retransmission consent negotiations. Second, Sinclair wrongly assumes that the Commission is powerless to provide injunctive relief because that power is not expressly enumerated in Section 325.[21]

Section 4(i) of the Communications Act authorizes the Commission to "perform any and all acts . . . not inconsistent with this Act, as may be necessary in the execution of its functions."[22] As Mediacom explained in its Petition for An Emergency Order Granting Interim Carriage Rights, the Commission's ability to fulfill its regulatory responsibilities regarding retransmission consent would be fatally undermined if it could not order interim carriage. Indeed, retransmission complaints are likely to be filed immediately prior to contract expiration, when the parties are otherwise unable to resolve their differences. To protect the public, it is essential that the Commission have the ability to provide for interim carriage while it considers the underlying complaint.[23] Such relief need not be automatic, but it should be grantable under the well-settled principles for granting injunctive relief.[24]

The public interest and the balance of potential harm would ordinarily weigh heavily in favor of granting interim carriage relief in cases involving a retransmission consent dispute, as the MVPD and its customers would be protected from a service disruption, while the interim

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[21] *See* Answer at 31, n. 53.

[22] 47 U.S.C. Section 154(i).

[23] Although the Commission declined to provide interim carriage relief in a retransmission consent case involving Mediacom and Sinclair in 2006/2007, that determination was made *after* the Commission rejected Mediacom's underlying Complaint. Assuming *arguendo* declining interim carriage relief was appropriate in that context, it does not mean it would be appropriate to decline interim relief while the Commission is still considering a *bona fide* Complaint.

[24] *See generally Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F. 2d 841, 842 (D.C. Cir. 1977).

arrangement would pose no offsetting loss to the broadcaaster. If a permanent carriage is ultimately reached, the terms thereof would, after all, apply backward to the date interim carriage commenced.

The Commission's general authority to enforce the Communications Act (including, but not limited to, Section 325) and its own regulations, necessarily includes the ability to grant temporary injunctive relief. The fact that cable operators must secure retransmission consent from the "originating station" does not mean that the Commission is foreclosed from providing temporary relief while adjudicating retransmission consent complaints. Section 76.7(e) of the Rules specifies that the Commission may determine "whether temporary relief should be afforded any party pending the hearing and the nature of any such temporary relief."[25] There is absolutely no evidence that Congress meant to abridge the Commission's ordinary injunctive authority in adopting Section 325. To the contrary, such authority is an integral component of the Commission's retransmission consent responsibilities.

CONCLUSION

The Commission is responsible for ensuring that retransmission consent is applied in a manner consistent with the public interest. The allegations and evidence in this case require careful Commission consideration. Consistent with existing procedural rules,[26] the Commission should designate this matter for an adjudicatory hearing and simultaneously afford the parties the opportunity to instead resolve the matter through alternative dispute resolution procedures.

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[25] 47 C.F.R. Section 76.7(e).

[26] See 47 C.F.R. Section 76.7(g)(1) and (2).

Whichever option is pursued, the Commission should ensure that retransmission service continues by providing Mediacom with the requested interim carriage relief.

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